

FILED

STATE OF NORTH CAROLINA IN THE GENERAL COURT OF JUSTICE
WAKE COUNTY 2019 MAY -1 PM 4:07 SUPERIOR COURT DIVISION
18 CVS 014001

WAKE CO., C.S.C.

COMMON CAUSE, *et al.*)
Plaintiffs,)
v.)
Representative DAVID R. LEWIS,)
in his official capacity as Senior)
Chairman of the House Select)
Committee on Redistricting, *et al.*,)
Defendants.)

ORDER

THIS MATTER comes before the undersigned three-judge panel upon Plaintiffs' Motion for Clarification Pursuant to Rule 45, filed April 4, 2019, Plaintiffs' Supplemental Brief regarding Plaintiffs' First and Second Motions to Compel, filed April 12, 2019, and, Legislative Defendants' Motion to Amend the Case Management Order, filed April 22, 2019.

Procedural and Factual Background

a. Plaintiffs' Motion for Clarification Pursuant to Rule 45

On February 13, 2019, Plaintiffs issued a subpoena to Stephanie Hofeller Lizon c/o Tom Sparks, Esq. of Fiduciary Litigation Group (hereinafter "Ms. Hofeller") daughter of the late Dr. Thomas Hofeller, requesting the production of various documents in her possession relating to Dr. Hofeller's work on redistricting. The subpoena also requested "any storage device" containing these redistricting-related documents in the form of electronically stored information ("ESI"), as well as any ESI relating to the requested documents. No objection to or motion to quash the subpoena was filed by any party to this action or Ms. Hofeller.

On March 13, 2019, Plaintiffs' counsel received from Ms. Hofeller four external hard drives and eighteen thumb drives (hereinafter collectively referred to as "the hard drives") responsive to the subpoena. On March 20, 2019, Plaintiffs provided notice to opposing parties of documents received in response to the subpoena, pursuant to the requirements of Rule 45(d1) of the North Carolina Rules of Civil Procedure.

Upon Legislative Defendants' request for copies of the produced documents, Plaintiffs' counsel informed counsel for Legislative Defendants that Plaintiffs' forensic expert had determined certain private files of Dr. Hofeller's were intermingled with his redistricting-related files. Plaintiffs' counsel proposed filtering out the private files prior to producing the remaining files to opposing parties; however, both Legislative Defendants and intervenor defendants believed the clear text of Rule 45(d1) required Plaintiffs to produce the hard drives in their entirety for copying and inspection.

On April 4, 2019, Plaintiffs filed a motion for clarification as to their responsibilities under Rule 45.

b. Plaintiffs' Supplemental Brief regarding Plaintiffs' First and Second Motions to Compel

On February 19, 2019, Plaintiffs filed their first motion to compel discovery responses from Legislative Defendants. On February 22, 2019, Plaintiffs filed their second motion to compel discovery responses from Legislative Defendants. Plaintiffs' motions to compel also requested that the Court award Plaintiffs' fees and expenses.

On March 25, 2019, the Court entered an order granting Plaintiffs' requests in the first motion to compel. Due to Legislative Defendants' failure to provide complete discovery by the March 20, 2019, deadline, the Court also extended Plaintiffs' deadline to produce expert witness reports from March 22, 2019, to April 8, 2019. The issue of Plaintiffs' fees and costs was held open to consider the matter in the event that Legislative Defendants failed to comply with the terms of the order.

As required by the Court's order, Legislative Defendants served additional responses to Plaintiffs' discovery requests on April 3, 2019. On April 9, 2019, Plaintiffs notified Legislative Defendants that certain answers to interrogatories remained deficient, the search methodology utilized by Legislative Defendants was improperly limited in scope, and the enclosed privilege log did not conform to the applicable requirements under the Rules of Civil Procedure. On April 12, 2019, Plaintiffs filed a supplemental brief regarding Plaintiffs' first and second motions to compel, which while not perfect in form, requests the Court compel Legislative Defendants' compliance with its previously-entered order.

Legislative Defendants have since offered to negotiate an expanded search but contend Plaintiffs' requested search parameters are too broad in scope. And on April 25, 2019, Legislative Defendants provided an updated privilege log which Plaintiffs acknowledge is now proper in form.

c. *Legislative Defendants' Motion to Amend the Case Management Order*

On April 22, 2019, Legislative Defendants filed a motion to extend Legislative Defendants' deadline to provide expert reports from April 30, 2019, to May 14, 2019. Legislative Defendants contend an extension should be granted because Plaintiffs' alleged delay in providing discovery responses hindered their ability to prepare rebuttal expert reports.

The parties have responded to or made their position known as to each motion in accordance with the Court's March 13, 2019, case management order, and on April 30, 2019, a telephonic hearing was held on the parties' pending motions. The matters were taken under advisement.

After considering the motions, the matters contained therein, and the parties' respective briefs, position statements, and arguments on the motions, and having reviewed the record proper, the Court rules on the motions as follows:

Plaintiffs' Motion for Clarification under Rule 45

Rule 45(d1) of the North Carolina Rules of Civil Procedure governs the issuing party's responsibilities after material is received in response to a subpoena. "A party or attorney responsible for the issuance and service of a subpoena shall, within five business days after the receipt of material produced in compliance with the subpoena, serve all other parties with notice of receipt of the material produced in compliance with the subpoena and, upon request, shall provide all other parties a reasonable opportunity to copy and inspect such material at the expense of the inspecting party." N.C.G.S. § 1A-1, Rule 45(d1).

In light of the specific requests in Plaintiffs' subpoena for "any storage devices" containing responsive documents, as well as the plain language of Rule 45(d1), Plaintiffs must provide all other parties a reasonable opportunity to copy and inspect the hard drives *in their entirety as originally received* at the expense of the inspecting party. Plaintiffs have already identified certain files and folders they deem private and, in accordance with the April 5, 2019, Consent Protective Order and the processes contained therein, have the ability to designate any files or folders they consider private as "HIGHLY CONFIDENTIAL/OUTSIDE ATTORNEYS' EYES ONLY" prior to production.

Plaintiffs' Supplemental Brief Regarding Plaintiffs' First and Second Motions to Compel

Plaintiffs contend Legislative Defendants failed to provide adequate discovery responses per the Court's March 25, 2019 order and, as a result, should be ordered to expand their search for documents responsive to Plaintiffs' discovery requests. The Court, in its discretion, grants Plaintiffs' requests in the supplemental brief pertaining to Legislative Defendants' electronic search for records responsive to Plaintiffs' discovery requests as follows:

- Legislative Defendants must search for responsive documents within the broader timeframe (August 11, 2016 through November 13, 2018) requested by Plaintiffs.
- Legislative Defendants must use the same search terms already used and must also use the additional search terms "Hofeller" and "formula" as requested by Plaintiffs.
- If the expanded timeframe and additional terms produce results that are too broad in scope, Legislative Defendants must cooperate with Plaintiffs and run more limiting searches designed to identify responsive documents at the direction of Plaintiffs.

- If asserting a claim of privilege as to documents procured in any additional search, then Legislative Defendants must produce a privilege log in accordance with N.C.G.S. § 1A-1, Rule 26(b)(5)(a).
- Legislative Defendants must continue to disclose information regarding custodians, non-custodial data sources, date ranges, and search methodology of discovery produced in electronic format in accordance with Rule 5.7 of the Local Rules for Civil Superior Court, Tenth Judicial District.
- The search process and production of responsive documents shall be completed by May 14, 2019.
- Counsel for Legislative Defendants should be familiar with *Rule 3.2 of the Rules of Professional Conduct*, entitled *Expediting Litigation*, and *Rule 3.4(d)(2)*, entitled *Fairness to Opposing Party and Counsel*, and compliance with this order, particularly in regards to this deadline, should comport therewith.

Legislative Defendants have since produced a privilege log in compliance with the Court's March 25, 2019, order, and Plaintiffs at the hearing on this matter abandoned their pursuit of additional, supplemental answers to certain interrogatories. As such, Plaintiffs' request that Legislative Defendants be compelled to provide a privilege log in full and supplement answers to certain interrogatories is now moot.

Nonetheless, Legislative Defendants failed to fully comply with the terms of Court's March 25, 2019, order.

When a motion to compel discovery "is granted, the court shall, after opportunity for hearing, require the party . . . whose conduct necessitated the motion . . . to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust." N.C.G.S. § 1A-1, Rule 37(a)(4). The purpose of Rule 37(a)(4) "is

not to punish the noncomplying party, but to reimburse the successful movant for his expenses.” *Benfield v. Benfield*, 89 N.C. App. 415, 422, 366 S.E.2d 500, 504 (1988).

Legislative Defendants failed to timely produce a privilege log in compliance with Rule 26(b)(5)(a), and failed to fully and reasonably search for records responsive to Plaintiffs’ requests for production in the manner reasonably suggested by Plaintiffs. There is no evidence of substantial justification for Legislative Defendants’ actions of which Plaintiffs complain in their supplemental brief as to the previously-granted first motion to compel. Nor is there evidence of other circumstances that would make an award of expenses, including attorneys’ fees, unjust. Accordingly, the Court hereby grants Plaintiffs’ request. Legislative Defendants will be required to pay to Plaintiffs the reasonable expenses and attorneys’ fees incurred as a result of Plaintiffs filing and arguing for the relief sought in their supplemental brief as to their previously-granted first motion to compel.

Legislative Defendants’ Motion to Amend the Case Management Order

Legislative Defendants’ allotted time period for submitting expert reports was abridged largely as a result of their own delays in providing complete discovery responses to Plaintiffs. However, because thorough and complete expert reports will likely play a vital role in assisting the Court in understanding the complex technological and mathematical aspects of this case, the Court grants in part Legislative Defendants’ motion to amend the case management order.

The Court notes that Intervenor Defendants made an oral motion at the April 30, 2019, hearing, requesting an extension of their deadline for expert witness reports as well; however, Intervenor Defendants had previously responded to Plaintiffs' discovery requests that they would not be utilizing an expert, and there was no supplementation of that interrogatory response prior to the hearing. Furthermore, the motion to amend the case management order filed by Legislative Defendants sought only an extension of time for Legislative Defendants' expert report deadline. Therefore, for these reasons, the oral motion to extend Intervenor Defendants' deadline is denied.

WHEREFORE, the Court, for the reasons stated herein and in the exercise of its discretion, hereby ORDERS as follows:

1. Plaintiffs' motion for clarification under Rule 45 is DENIED in part as follows:
 - a. Plaintiffs shall, within forty eight (48) hours of the entry of this order, provide all other parties the opportunity to copy and inspect unaltered copies of all hard drives received in response to the subpoena issued to Ms. Hofeller.
 - b. The files and folders already identified by Plaintiffs as containing Dr. Hofeller's private information shall be designated by Plaintiffs as "HIGHLY CONFIDENTIAL/OUTSIDE ATTORNEYS' EYES ONLY" in accordance with the April 5, 2019, Consent Protective Order.
2. Plaintiffs' supplemental brief is GRANTED in part as follows:
 - a. Legislative Defendants shall conduct a search for documents responsive to Plaintiffs' discovery requests, in accordance with the terms of this Order.
 - b. Plaintiffs' requested relief pertaining to compelling the production of a privilege log and additional, supplemental answers to certain interrogatories is MOOT.
 - c. Plaintiffs' request for expenses and attorneys' fees is GRANTED, in accordance with the terms of this Order. Plaintiffs shall submit an affidavit showing an accounting of expenses and attorneys' fees within ten (10) days of the entry of this order.

Certificate of Service

The undersigned certifies that the foregoing was served upon all parties by electronic mail, addressed as follows:

Edwin M. Speas, Jr.
Caroline P. Mackie
Poyner Spruill LLP
espeas@poynerspruill.com
cmackie@poynerspruill.com
*Counsel for Common Cause,
The North Carolina Democratic Party
And the Individual Plaintiffs*

R. Stanton Jones
David P. Gersch
Elisabeth S. Theodore
Daniel F. Jacobson
Arnold & Porter Kaye Scholer, LLP
Stanton.jones@arnoldporter.com
David.gersch@arnoldporter.com
Elisabeth.theodore@arnoldporter.com
Daniel.jacobson@arnoldporter.com
*Counsel for Common Cause
And for Individual Plaintiffs*

Mark E. Braden
Richard Raile
Trevor Stanley
Baker & Hostetler, LLP
rraile@bakerlaw.com
mbraden@bakerlaw.com
tstanley@bakerlaw.com
Attorneys for Legislative Defendants

Marc E. Elias
Aria C. Branch
Perkins Coie, LLP
melias@perkinscoie.com
ABranch@perkinscoie.com
*Counsel for Common Cause
And the Individual Plaintiffs*

Abha Khanna
Perkins Coie, LLP
akhanna@perkinscoie.com
*Counsel for Common Cause
And the individual Plaintiffs*

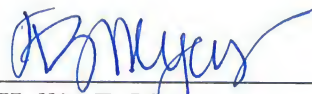
Phillip J. Strach
Michael McKnight
Alyssa Riggins
Ogletree, Deakins et al.
Phillip.strach@ogletree.com
Michael.mcknight@ogletree.com
Alyssa.riggins@ogletree.com
Counsel for Legislative Defendants

Stephanie A. Brennan
Amar Majmundar
Paul Cox
NC Department of Justice
sbrennan@ncdoj.gov
amajmundar@ncdoj.gov
pcox@ncdoj.gov
*Counsel for the State of North
Carolina and members of the State
Board of Elections*

Josh Lawson
NC State Board of Elections
joshua.lawson@ncsbe.gov
*Counsel for the State Board of
Elections*

John E. Branch, III
H. Denton Worrell
Nathaniel J. Pencook
Shanahan McDougal, PLLC
jbranch@shanahanmcdougal.com
dworrellshanahanmcdougal.com
npencook@shanahanmcdougal.com
Attorneys for Defendant-Intervenors

This the 1st day of May, 2019.



Kellie Z. Myers
Trial Court Administrator
10th Judicial District
Kellie.Z.Myers@nccourts.org